

United States Court of Appeals
For the Ninth Circuit

HELGA CARLEN, JOHN T. CARLEN, CATHRYN MCKAY, AR-
THUR R. MCKAY, ARTHUR R. and CATHRYN MCKAY
and JOHN T. and HELGA CARLEN, *Appellants,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Appellee.*

APPEAL FROM THE TAX COURT OF THE UNITED STATES

REPLY BRIEF OF APPELLANTS

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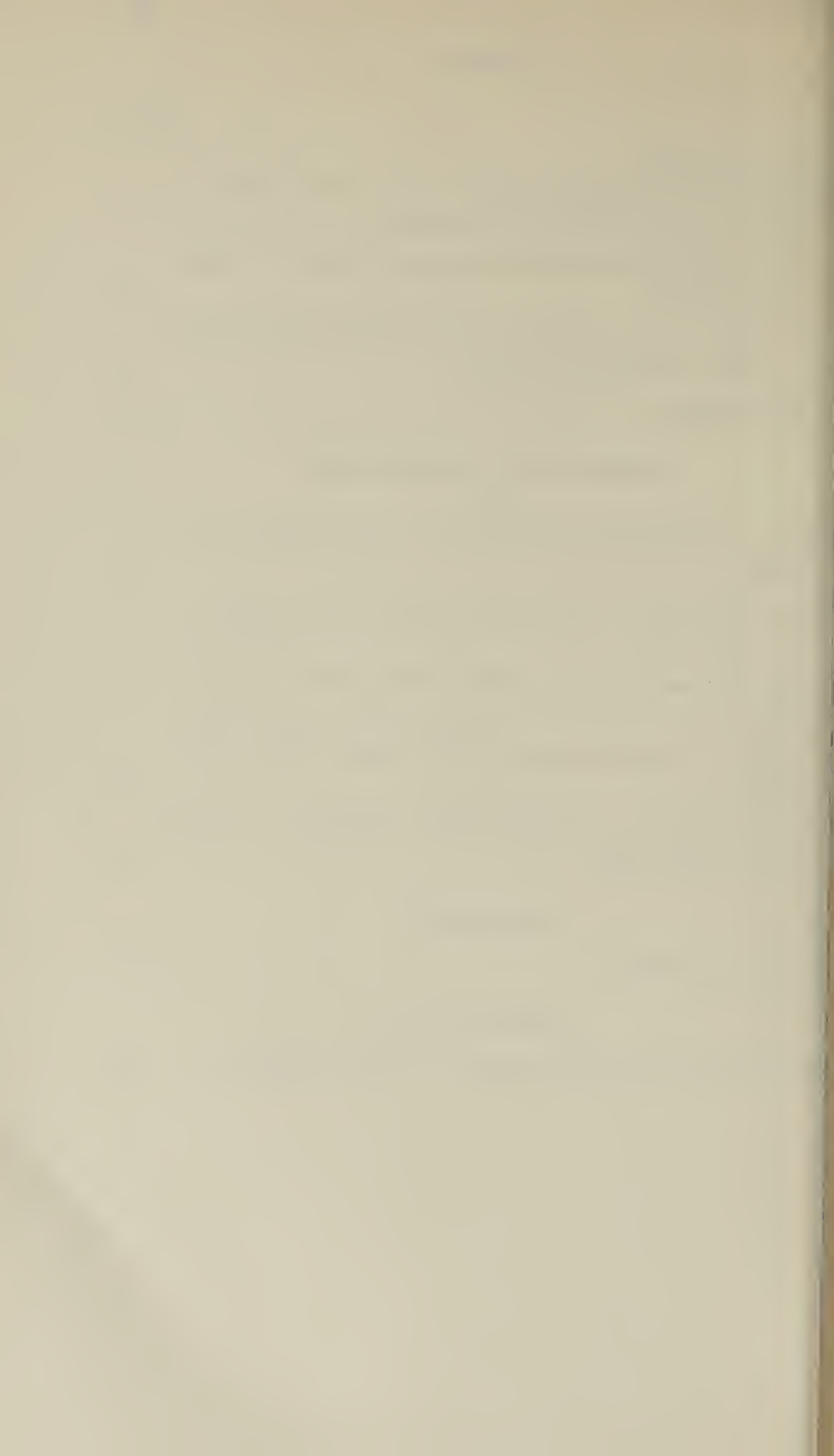
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Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

No. 14090

APPEAL FROM THE TAX COURT OF THE UNITED STATES

REPLY BRIEF OF APPELLANTS

A. INTRODUCTION

The Tax Court did not give proper weight to the vital elements of the relationship between McKay and Carlen, the partnership, and E. K. Bishop Lumber Company. These elements are set forth in appellants' brief (Br. 5 to 12). Respondent in his answering brief has ignored many of these elements and has relied primarily on the inferences drawn by the Tax Court from the evidence. The court's findings upon which the ultimate finding is based, that the appellants are not entitled to the provisions of Section 117(k)(1) of the Internal Revenue Code, are at variance with the uncontradicted testimony of the witnesses and are clearly erroneous.

B. ULTIMATE FINDING OF FACT AND CONCLUSION OF LAW UNSUPPORTED BY EVIDENCE.

I. The Tax Court Disregarded Uncontradicted Testimony.

Oral testimony was proper to assist in the interpretation of the contract between Neuskah (later Bishop) and to clearly reflect the understanding of the parties. *Landa v. Commissioner*, 206 F.(2d) 431, 432 (D.C. Cir. 1953).

The Tax Court must accept the reasonable, sworn, unimpeached and uncontradicted testimony of a witness. *Foran v. Commissioner*, 165 F.(2d) 705 (5 Cir. 1938); *Grace Bros. Inc. v. Commissioner*, 173 F.(2d) 170, 174 (9 Cir. 1949). None of the recognized exceptions to the rule, such as where the testimony is inherently contradictory or improbable due to omissions or vague and evasive answers, are present in this case. Both McKay, one of the parties, and Aiken, a certified public accountant, testified on both direct and cross examination in a manner which was patently clear, forthright and complete. The Tax Court's failure to accept their unimpeached testimony and to give proper weight to the documentary evidence resulted in findings which were clearly erroneous within the meaning of Rule 52(a) Federal Rules of Civil Procedure.

The Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) stated that a finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm con-

viction that a mistake has been made. The Tax Court made numerous errors in the findings as set forth in appellants' original brief.

2. The Tax Court Drew Erroneous Inferences From Undisputed Facts.

This court in *McGah v. Commissioner*, 210 F.(2d) 769, 771 (9 Cir. 1954) considered a case similar in principal to the instant one. There the ultimate fact in question was whether the taxpayer held dwelling houses for sale in the ordinary course of business or held them for investment purposes. This court, after stating that a consideration of the entire evidence left it with the firm conviction that a mistake had been made, reversed the Tax Court finding that the houses were held primarily for sale in the ordinary course of business, and reversed the decision of the Tax Court without remand. This court stated at 210 F.(2d) 771:

“While giving careful consideration to the finding of the Tax Court, we draw our own inferences from undisputed facts.”

The case subject of this appeal is one in which all facts are undisputed except the ultimate fact. The respondent in his brief concedes that the facts are “virtually undisputed” (Br. 11). The only fact in question is the ultimate fact whether the partnership of McKay and Carlen had a contract right to cut timber and to sell the logs produced therefrom for their own account. The undisputed facts concerning risk of loss, road building, invoicing, cash discounts, purchases and sales journal entries, explanation of reservation of title, taken together with the principal contract entered

into between the partnership and Neuskah (later Bishop) (Exhibit No. 2, Tr. 16) clearly show that the finding of the ultimate fact by the Tax Court was grossly erroneous and its conclusion of law was in error.

C. CONCLUSION

Since the findings of fact of the Tax Court are clearly not supported by the evidence and the conclusion of law that the appellants are not entitled to the provisions of Section 117(k)(1) is erroneous, the decision should be reversed.

Respectfully submitted,

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